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7 and Unifund CCR Partners and
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8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 JASON E. DAVIS,

13 Plaintiff,

14 vs.
15

16 UNIFUND CCR PARTNERS, a
17 corporation; STEVEN A. BOOSKA,
an individual; and DOES 1 through 10
18 inclusive,

19 Defendants.
20

) CASE NO.: 3:07-CV-01767 SI

) **NOTICE OF MOTION AND**
) **MOTION TO DISMISS**
) **COMPLAINT BY DEFENDANT**
) **UNIFUND CCR PARTNERS;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION**

) Date: June 8, 2007
) Time: 9:00 a.m.
) Courtroom: 10 (19th Floor)

) The Honorable Susan Ilston
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1 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 8, 2007, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard in Courtroom 10 of this court, located at 450
4 Golden Gate Avenue, San Francisco, California, 94102, the Honorable Susan
5 Ilston presiding, defendant Unifund CCR Partners ("Unifund") will and hereby
6 does move this Court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules
7 of Civil Procedure, dismissing all of the claims asserted against Unifund in the
8 Complaint filed herein.

9 The motion is made on the grounds that all of the claims asserted by
10 plaintiff in this action are barred as a matter of law because they are compulsory
11 counterclaims which should have been, but were not, asserted by plaintiff against
12 Unifund in the prior state court action between these parties. The claims are
13 barred as a matter of law under controlling Ninth Circuit authority and pursuant to
14 California law.

15 This motion will be based upon this Notice of Motion and Motion, the
16 accompanying Memorandum of Points and Authorities in Support of the Motion,
17 the Request For Judicial Notice, upon all of the records on file in this action, and
18 upon such other and further evidence or argument that the Court may permit at the
19 hearing in this matter.

20
21 DATED: May 1, 2007

SIMMONDS & NARITA, LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

22
23
24 By: s/Tomio B. Narita

25 Tomio B. Narita
26 Attorneys for Defendants Unifund CCR
27 Partners and Steven A. Booska
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1 **I. INTRODUCTION**

2 A year ago, the plaintiff in this action, Jason E. Davis (“Davis”), was sued
3 in a state court case filed in Stanislaus County Superior Court by defendant
4 Unifund CCR Partners (“Unifund”). Davis filed an answer in that state court
5 action. He was represented by the same counsel that represents him in this case.
6 The state court answer asserted a number of affirmative defenses against Unifund,
7 including that the contract between Davis and Unifund was illusory, barred by the
8 statute of limitations and unenforceable, and that Unifund had violated the Fair
9 Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the “FDCPA”), the
10 California Rosenthal Fair Debt Collection Practices Act, California Civil Code §
11 1788 *et seq.* (the “Rosenthal Act”). Davis did not assert any counterclaims against
12 Unifund in the state court case.

13 Unifund dismissed the state court action, and Davis then filed this case.
14 Davis seeks to pursue the same claims in this court that he decided not to
15 prosecute in state court. All of the claims Davis asserts here are related to the
16 claims asserted in the state court action. They all turn on whether Unifund owned
17 an enforceable claim to recover money from Davis. Thus, Davis’s claims are
18 compulsory counterclaims that he should have filed – but did not file – in that
19 action. They are barred as a matter of law.

20 Davis had the opportunity to pursue these claims against Unifund in state
21 court, but he chose not to do so. He may not revive the abandoned claims in this
22 action. The Ninth Circuit has repeatedly upheld the dismissal of such claims,
23 because allowing them to proceed would completely undermine the purpose of the
24 compulsory counterclaim statute, which is designed to avoid a multiplicity of
25 actions and the piecemeal litigation of claims.

26 Unifund’s motion to dismiss should be granted. Davis cannot amend his
27 pleading, so the dismissal as to Unifund should be with prejudice.
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1 **II. ALLEGATIONS OF THE COMPLAINT**

2 The Complaint alleges that on May 31, 2006, Unifund filed an action
3 against Davis in the Superior Court of California, County of Stanislaus, Case No.
4 380735 (the “state court action”). *See* Complaint ¶ 30. A certified copy of the
5 complaint filed by Unifund against Davis in the state court action is attached as
6 **Exhibit A** to the Defendants’ Request For Judicial Notice In Support Of Motion
7 For Judgment On The Pleadings (“Judicial Notice”). The state court complaint
8 alleged that Davis had breached his contract with Unifund’ predecessor-in-interest
9 by failing to pay the amount due under the agreement. *See id.* In response to the
10 complaint, Davis retained his present counsel, Eric F. Fagan, to represent him, and
11 Davis filed an answer. *See* Judicial Notice, **Ex. B.**

12 In his state court answer, Davis asserted a series of affirmative defenses to
13 the complaint, including that Unifund had failed to state a valid claim, that its
14 claims were barred by the statute of limitations, and that the contract was
15 unenforceable and illusory. *See id.* His answer also alleged that Unifund had
16 violated the FDCPA and Rosenthal Act. *See id.* Davis did not, however, assert
17 any counterclaims against Unifund. The state court action was subsequently
18 dismissed by Unifund.

19 Davis’s Complaint in this case arises out of the identical claims asserted by
20 Unifund in the state court action. Davis maintains that the claim filed by Unifund
21 was time-barred, and that Unifund filed the state court action against him despite
22 the fact that it did not own the debt and that it lacked sufficient documentation to
23 prove the debt. *See* Complaint ¶¶ 16-40. Like his answer in the state court action,
24 the Complaint here alleges that Unifund’ communications violated both the
25 FDCPA and the Rosenthal Act. *See id.* ¶¶ 44-50.

1 **III. ARGUMENT**

2 **A. Standards Governing Motions To Dismiss**

3 Where, as here, “it appears beyond doubt that the plaintiff can prove no set
4 of facts in support of his claim which would entitle him to relief,” the Court may
5 grant a motion to dismiss under Rule 12(b)(6). *See Conley v. Gibson*, 355 U.S. 41,
6 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed. 2d 80 (1957). A dismissal under Rule
7 12(b)(6) can be based on either the lack of a cognizable legal theory or the absence
8 of sufficient facts alleged under a cognizable legal theory. *See Smilecare Dental*
9 *Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996);
10 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

11 While the Court must accept as true a plaintiff’s material allegations and all
12 reasonable inferences therefrom, *see NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 897
13 (9th Cir. 1986), the Court need not accept as true conclusory allegations that are
14 unsupported by the facts alleged, or that are couched in factual allegation, *see*
15 *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992); *McGlinchy v. Shell*
16 *Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Adams v. Johnson*, 355
17 F.3d 1179, 1183 (9th Cir. 2004) (“conclusory allegations of law and unwarranted
18 inferences are insufficient to defeat a motion to dismiss”).

19 **B. The FDCPA And Rosenthal Act Claims Fail As A Matter Of Law** 20 **Because They Are Compulsory Counterclaims That Should Have** 21 **Filed And Pursued In The State Court Action**

22 Davis’s Complaint in this action asserts that Unifund did not have a
23 legitimate right to seek to collect money from him, that it lacked the
24 documentation needed to prove his debt, and that Unifund’ claims in the state
25 court litigation were barred by the statute of limitations. Based on these
26 allegations, Davis asserts that Unifund’ attempt to collect his debt in the state
27 court proceedings violated the FDCPA and the Rosenthal Act.
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1 The claims in this case are directly related to the claims asserted by Unifund
 2 in the state court case. Indeed, Davis actually asserted FDCPA and Rosenthal Act
 3 violations as affirmative defenses in the state court case. For whatever reason,
 4 Davis decided not to pursue his purported FDCPA and Rosenthal Act claims in
 5 that forum. In light of the compulsory counterclaim rule, however, Davis's claims
 6 are barred as a matter of law. Judgment should be entered for Unifund.

7 The California compulsory counterclaim rule appears at section 426.30 of
 8 the California Code of Civil Procedure, and it reads in relevant part as follows;

9 **Except as otherwise provided by statute, if a party against whom a**
 10 **complaint has been filed and served fails to allege in a cross-complaint**
 11 **any related cause of action which (at the time of serving his answer to**
 12 **the complaint) he has against the plaintiff, such party may not**
 thereafter in any other action assert against the plaintiff the related
 cause of action not pleaded.

13 *See* Cal. Code Civ. Proc. § 426.30 (emphasis supplied). The purpose of the
 14 statute, as recognized by the California Supreme Court, is to prevent a piecemeal
 15 litigation by resolving all related claims between the parties in one action:

16 The law abhors a multiplicity of actions, and the obvious intent of the
 17 Legislature in enacting the counterclaim statutes . . . was to provide for the
 18 settlement, in a single action, of all conflicting claims between the parties
 19 arising out of the same transaction. Thus, a party cannot by negligence or
 design withhold issues and litigate them in successive actions; he may not
 split his demands or defenses; he may not submit his case in piecemeal
 fashion.

20 *See Flickinger v. Swedlow*, 45 Cal. 2d 388, 393 (1955) (citations omitted).

21 A claim will be considered a “related cause of action” that must be asserted
 22 as a counterclaim if it “arises out of the same transaction, occurrence, or series of
 23 transactions or occurrences as the cause of action which the plaintiff alleges in his
 24 complaint.” *See* Cal. Code Civ. Proc. § 426.10. Any related cause of action that
 25 existed but was not asserted when the answer was filed in the prior action is
 26 barred. *See AL Holding Co. v. O’Brien & Hicks, Inc.*, 75 Cal. App. 4th 1310,
 27 1313-14 (2000) (fact that original action was dismissed irrelevant: “The critical
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1 time period to which section 426.30 looks is that point in time when the complaint
2 has been filed and served against a defendant. . .”).

3 Courts in California have repeatedly held that the compulsory counterclaim
4 statute must be read broadly in order to achieve the purpose of avoiding piecemeal
5 litigation. *See, e.g., Currie Med. Specialities, Inc. v. Bowen*, 136 Cal. App. 3d
6 774, 777 (1982) (California courts have adopted “the expansive logical relation
7 test” used by federal courts under Rule 13(a) of Federal Rules of Civil Procedure);
8 *Sylvester v. Soulsburg*, 252 Cal. App. 2d 185, 192-93 (1967) (holding that tort
9 claim for trespass was compulsory counterclaim in prior foreclosure action: “The
10 word ‘transaction’ embraces almost any activity by a person which affects
11 another's right and out of which a cause of action may arise.”); *Saunders v. New*
12 *Capital for Small Bus., Inc.*, 231 Cal. App. 2d 324, 334 (1964) (term “transaction”
13 should be “liberally construed” to achieve statutory purpose of avoiding
14 multiplicity of actions).

15 In this action, there is no question that the claims are related, since the
16 claims Davis asserts in federal court are simply the flip-side of the breach of
17 contract claims that Unifund asserted in state court. The Complaint in this action
18 alleges that Unifund violated federal and state law because it allegedly was not
19 entitled to recover money from Davis – either because Unifund did not own the
20 debt, because it did not have sufficient documentation to prove the debt, or
21 because the claims were barred by the statute of limitations. *See* Complaint ¶¶ 16-
22 40. These are the same affirmative defenses that Davis asserted in his state court
23 answer. *See* Judicial Notice, **Ex. B**. The claims in this action could hardly be
24 more “related” to the claims in Unifund’ state court action.

25 The Ninth Circuit has repeatedly held that a party who fails to assert a
26 compulsory counterclaim in state court litigation may not subsequently pursue the
27 claim in federal court. *See Cheiker v. Prudential Ins. Co. of Am.*, 820 F. 2d 334,
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337 (9th Cir. 1987) (applying § 426.30 of California Code of Civil Procedure to bar contract and tort claims: “since appellant’s causes of action here are related to the Interpleader action, we hold that appellant cannot now litigate those related causes of action. Otherwise, piecemeal litigation will occur and defeat the purpose of the compulsory cross-claim statute.”); *Springs v. First Nat’l Bank of Cut Bank*, 835 F.2d 1293, 1296 (9th Cir. 1988) (barring negligence claim that should have been asserted as compulsory counterclaim in state court foreclosure action); *Pochiro v. Prudential Ins. Co. Of Am.*, 827 F.2d 1246 (9th Cir. 1987) (barring claims for defamation, breach of contract and abuse of process that were compulsory counterclaims in an earlier trade secrets action). Davis cannot assert his claims here, because he failed to assert them as compulsory counterclaims in the state court action. Accordingly, Unifund is entitled to a dismissal.

IV. CONCLUSION

All of the claims asserted in this action are compulsory counterclaims that should have been asserted in the prior action. The motion to dismiss should be granted, and all claims against Unifund should be dismissed. Since Davis cannot amend his pleading, the dismissal as to Unifund should be with prejudice.

DATED: May 1, 2007

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